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FILED
AUG 19 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 08-41

In The

Supreme Court of the United States

WILLIAM DUPRE,

Petitioner,

v.

TELXON CORPORATION and
SYMBOL TECHNOLOGIES, INC.,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Ohio

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR PETITIONER

The three main arguments opposing jurisdiction that were raised in Respondents' brief are fundamentally flawed. The appointed appellate panel ruled that Ohio did not have a remedy for the constitutional injury suffered by Dupre not, as Respondents suggest, that Dupre defaulted. The distinctions Respondents draw between this matter and the other decisions by state courts of last resort are not meaningful and do not aid Respondents' argument. Finally, the fact that campaign contributions were filtered through various political parties and/or committees weighs in favor of granting certiorari. This matter constitutes the perfect vehicle for this Court to address the issue of campaign contributions comprehensively, and not on a piecemeal basis.

I. There Has Been No Procedural Default Because The Appointed Panel Clearly Stated That Ohio Had No Procedural Vehicle Through Which Dupre Could Remedy The Constitutional Violation He Suffered As A Result Of The Ninth District Court Of Appeal's Initial Decision.

Respondents' statement that the "sole reason for the Ohio courts' denial of Dupre's claim of judicial bias is his failure to follow reasonable procedural rules under state law," is demonstrably false. R. at 3. Respondents fail to cite either the appointed panel's order or the Ohio Supreme Court's order declining jurisdiction in support of this brazen claim. The reason for this omission is that neither the panel nor the Ohio

Supreme Court ruled that Dupre was required to file a motion to disqualify a judge or justice before Dupre knew about the circumstances that would warrant disqualification. Respondents' *implicit argument* that Dupre should have known his right to due process was going to be violated because "Meyerson's contributions to his local Republican party – were a matter of public record before and during the proceedings below," is offensive on several fronts. R. at 2, 4.

The factual *premise* of Respondents' implicit argument, that "Meyerson's contributions to his local Republican party - - were a matter of public record before and during the proceedings below," is highly questionable. As Respondents are aware, many of the campaign records for the "local Republican party" were *shredded* by the Summit County Board of Elections shortly after the motion to vacate the Ninth District Court of Appeals' original judgment was filed.[1] *See*, http://www.cpclerk.co.summit.oh.us (Dupre's Reply Memorandum filed on 3-2-07, at fn. 3). Therefore, it is impossible to know what all of the campaign records would have revealed "before and during the proceedings below." R. at 2. Again, Dupre was not permitted to take discovery. Pet. at 9.

What is clear is that campaign records are not required to be filed simultaneously with contributions

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[1] As set forth in the initial Petition, the Chairman of the "local Republican party" was also a board member for the Summit County Board of Elections.

under Ohio law,[2] that at least some of the campaign records (which were reviewed after the original decision) had already been *amended* on multiple occasions, and that, at last count, the financial records for the "local Republican party" were "impossible to audit." Stephanie Warsmith, *Mistakes fill GOP finance reports*, Akron Beacon Journal, December 27, 2007, at A1. Equally troubling is the fact that certain mandatory and relevant disclosures were not made by Judge Batchelder until *after* Smart Media moved to vacate the initial judgment. Phil Trexler, *Ex-Judge is Accused of Bias; Company That Lost $212 Million Verdict on Appeal Contends Donations to GOP Influenced Decision,* Akron Beacon Journal, Jan. 12, 2007, at B1. That Judge Batchelder had been to Meyerson's home to solicit a contribution and recognized Meyerson's name in the record was not information that could be gleaned from the public records. *Id.* It is uncertain what Dupre would have found if he divined that his right to an impartial tribunal was about to be violated "before and during the appeal" of the jury's verdict.

However, even if some of the relevant information was available through the public record (albeit undiscovered), the *conclusion* to Respondents' implicit argument, that it is the obligation of the private

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[2] The Ohio State Bar Association did not even set forth a formal policy statement calling for full and immediate disclosure of campaign contributions in judicial races by candidates until January 13, 2004. *See,* Press Release, Ohio State Bar Association, Ohio State Bar Association Calls For Judicial Campaign Contribution Disclosure (Jan. 13, 2004) *available at* www.ohiobar.org/pub/pr/index.asp?artilceid=158.

litigant or counsel to scour the public records to determine whether the judge will be fair and impartial, is repugnant to this Court's precedent and the United States Constitution. In *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 830 (1986), the petitioner discovered that Justice Embry had a conflict of interest (that was also a matter of public record) only after the Alabama Supreme Court's original decision. *Id.* Nevertheless, this Court accepted the case and vacated the original decision because Judge Embry was constitutionally "disqualified" from hearing the matter in the first instance. *Id.* at 837. The Fourteenth Amendment places the obligation to refrain from violating a citizen's constitutional rights upon the state actor. The Constitution does not require that the citizen who might suffer a constitutional injury at the hands of a state actor actively investigate that state actor before the injury occurs.

Moreover, what are Respondents actually saying about the justice system and the judiciary in the United States? That although a judge has a constitutional obligation to be fair and impartial, the litigant better make sure his or her judge is not predisposed to violate the Constitution, and the litigant better do so prior to a hearing? That although nearly every state requires judges to disclose circumstances that would lead a reasonable observer to question their impartiality, it is imprudent to believe that judges will actually adhere to the states' ethical canons? *See, i.e.,* Pet. App. at 15a. That although the law presumes that judges are not biased, the law requires counsel to assume they are? Are Respondents really asking this Court to send a message to attorneys practicing law in the majority of

states that elect judges that they cannot trust the judiciary? For the only reason any lawyer or client would have a duty to focus on campaign contributions made to a judge, instead of the law and the facts of a case, is that the law no longer presumed that judges would comply with their own constitutional mandates. Explicitly articulated and logically examined, Respondents' implicit argument offends common sense, fundamental notions of due process, and the integrity of the judiciary as a whole.

Once Respondents' implicit argument is rejected, it becomes clear that Ohio has no procedural process through which Dupre could remedy his constitutional injury. Respondents' brief only underscores this point. R. at 3-4. The state processes that are cited by Respondent are only available to a litigant who discovers the grounds for disqualification prior to a judge's decision. *Id.* Here, Dupre and counsel were unaware of the basis of disqualification until well after the decision. What Respondents are really arguing is that if you discover your constitutional violation after it occurs, Ohio does not have to provide you with a procedural avenue to remedy the violation. There is of course, no authority cited for the proposition that a state can cure a constitutional violation merely by failing to provide a process through which to remedy that violation. For nearly eighty years this Court has consistently stated that such a failure constitutes an additional violation of due process and not a basis for denying review. *See, Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 682 (1930):

> But, while it is for the state courts to determine the adjective as well as the substantive law of

> the State, they must, in doing so, accord the parties due process of law. Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it.

While addressing Dupre's motion for leave to file an application for reconsideration, Respondents simply rewrite the majority's decision. Respondents contend that "extraordinary circumstances were plainly absent because Dupre filed his motion nearly a year after the Ninth District made its decision, despite the fact that the grounds for his motion - - Meyerson's contributions to his local Republican party – were a matter of public record before and during the proceeding below." R. at 4. Again, Respondents do not cite to the actual decision authored by the appointed panel. Nowhere in the decision did the panel indicate that extraordinary circumstances were absent. Indeed, the majority, while "acknowledg[ing] Dupre's contention to that effect," declined to dispute it. *Compare,* Pet. App. 7a-8a, *with,* R. at 4. Nor did the majority assert that Dupre's motion was denied because of the passage of time as do the Respondents. *Id.*[3]

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[3] Respondents' argument here is entirely circular. The only reason Dupre had to demonstrate "extraordinary circumstances" in order to obtain leave under Ohio App. R. 14(B) is that the application for reconsideration was not filed within the ten-day period provided by Ohio App. R. 26(A). Had Dupre been aware of the operative facts ten days after the original decision, he would have simply filed the application. Arguing that extraordinary circumstances

Instead, the majority of the panel began by noting that an application for reconsideration could not be employed to undertake "an *ab initio* examination of the appeal on the merits." Pet. App. at 7a. The majority then ruled that they did "not have authority to disqualify a judge for an alleged violation of an appearance standard." *Id.* These rulings would have been completely unnecessary if the majority believed, as Respondents contend, that Dupre had not set forth extraordinary circumstances. Further, these rulings only underscore that the majority's opinion was based on its understanding that the procedural avenue outlined by Ohio App. R. 14(B) would not allow for a *de novo* review of a decision that was authored by a constitutionally disqualified judge.[4] In sum, the majority, after inquiring as to whether "Dupre [has] a procedural avenue to seek the requested relief," concluded that he did not. Pet. App. at 6a.

Ohio's failure to provide a procedural mechanism through which a litigant can challenge a judgment authored by a constitutionally disqualified judge, after the judgment is entered, is not as Respondents suggest "a straightforward application of state-law procedural rules." R. at 5. This failure amounts to a second violation of Dupre's due process rights. *See,*

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were lacking because the application was not "timely" defeats the entire purpose of the rule designed to allow for late filing.

[4] By way of omission, Respondents effectively concede that the last ground stated by the majority of the panel, that Dupre did not file an application for reconsideration before being granted leave, was not a ruling on state procedure that complied with this Court's precedent.

Brinkerhoff-Faris Trust, 281 U.S. at 682. Because the violation of Dupre's Fourteenth Amendment due process right was raised before the appointed panel, Ohio was required to maintain some process through which the violation could be reviewed. *See, Ake v. Oklahoma*, 470 U.S. 68, 75 (1985), *citing, Enter. Irrig. Dist. v. Farmers Mutual Canal Co.*, 243 U.S. 157, 164 (1917) (noting that "where the non-Federal ground is so interwoven with the other as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other, our jurisdiction is plain.") While the dissent went to extraordinary lengths to illustrate how Dupre's due process rights had been violated, the majority remained conspicuously silent on the issue. This case is ripe for review.

II. There Are No Meaningful Distinctions That Can Be Drawn Between The Case *Sub Judice* And Those Cases Decided By Other State Courts Of Last Resort That Have Held Similar Conduct By State Actors To Be Unconstitutional.

Respondents only half-heartedly contend that the split in authority among the state courts of last resort can be meaningfully distinguished from the case at hand. R. at 5. Respondents contend that *Pierce v. Pierce*, 39 P.3d 791 (Okla. 2001), can be distinguished because the litigant moved for disqualification prior to the judge's decision. *Id.* As noted above, this matter would only involve a procedural default if a party was aware of the contributions before the judgment. Respondents also argue that the campaign contributions did not go directly to Judge Batchelder

while he was a judge and that he was not running for reelection as a judge "during Dupre's appeal." R. at fn.2. Respondents ignore the fact that the local party donated $20,000 to Judge Batchelder while Judge Batchelder was a candidate for judge, and during the same year Meyerson contributed heavily to the party, which was coincidentally the same year Meyerson is known to have learned of the litigation. Pet. App. at 5a. It is respectfully submitted that a contribution in excess of six times the established campaign limits made by a former Chairman of a corporate party, who owns millions in stock and options in that corporate party, that passes through a local political party Chairman (who has a documented history of intimidating judges), to the judge who authors the opinion reversing the largest verdict in county history, are not factors mitigating against bias. Accordingly, Respondents' distinction from *Pierce*, while perhaps factually accurate, is not one that serves their argument.

Respondents then incredibly contend that the "three other cases" cited by Dupre did not involve a "procedural default." R. at 6. That is simply false. According to Respondents' definition of what constitutes a procedural default, a motion filed by an unknowing party after judgment is entered, all three involved procedural defaults. *See, Tesco v. Strong Inds. Inc.*, 221 S.W.3d 550, 554 (Tex. 2006)("We have never before addressed what happens when an appellate opinion and judgment issue before it is discovered that one of the justices is disqualified"); *Powell v. Anderson*, 660 N.W.2d 107, 112 (Minn. 2003)("Approximately one and one-half years after he authored the Powell opinion, Judge Amundson resigned his seat on the

court of appeals."); *Johnson Timber Corp. v. Sturdivant*, 758 S.W.2d 663 (1988)(where the entire Arkansas Supreme Court disqualified itself from hearing two separate petitions for rehearing after this Court's decision in *Lavoie*). All of these courts ordered re-hearings or their procedural equivalents. There are no meaningful distinctions that would ameliorate the conflicts between the state courts of last resort.

III. The Reality Of Parties Seeking To Circumvent Established Campaign Contributions Limits When The Stakes Are High Enough Is What Makes This Case The Perfect Vehicle For Addressing The Relevant Issue.

Respondents contend that this case presents "an extremely poor vehicle to take up the questions of whether and when the U.S. Constitution requires that judges who have received campaign contributions must be disqualified." R. at 6. In support of their contention, Respondents explain that the money was filtered through the local party and omit the fact that the party was chaired by a serial political bully with a history of intimidating judges within his own political party.[5] R. at 7. Put differently, Respondents ask this

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[5] Respondents do not even bother to address Justice Maureen O'Connor's participation in the initial decision to deny jurisdiction (wherein she cast the deciding vote), nor do they attempt to excuse her subsequent refusal to recuse herself after a motion to disqualify was filed the second time the matter appeared before the Ohio Supreme Court. Respondents also ignore all of the money that was received directly or indirectly by the Justice from Meyerson. The fact that Respondents as much as concede these

Court to declare unconstitutional conduct "permissible," if it is undertaken in a sophisticated manner. What a relief that paradigm will be to those litigants who have their rights violated by opposing parties who are simpletons! The problem, of course, is that the individuals who are most inclined to avail themselves of the perceived benefits of contributing heavily to judges hearing their cases, are rarely so foolish. As is also demonstrated by *Caperton v. A.T. Massey Coal Co.*, U.S. Supreme Court Case No. 08-22, when the stakes are high enough, parties will avoid duly enacted campaign finance laws precisely by using third parties and not contributing directly.

The fact that the two cases that have simultaneously come before this Court involve both direct and indirect contribution schemes weighs in favor of granting certiorari not against it. If the Court avoids the issue today and instead waits for the case where only direct contributions are at issue, the issue will evade review only to reappear before the Court at a later date. *See, e.g., Avery v. State Farm Mut. Auto. Ins. Co.*, 547 U.S. 1003 (2006)(where this Court denied certiorari after a comprehensive contribution scheme was discovered), *see also, Jones v. Burnside,* 127 S. Ct. 370 (2006)(where the trial judge recused herself after the petition was filed). For if sizeable campaign contributions are determined to cross over the outer boundaries of the Due Process Clause when made directly, parties will stop making direct contributions and employ PACS or political parties. At which point

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constitutional violations weighs heavily in favor of ordering the Writ of Certiorari.

a litigant will again ask this Court the following question: Is that not a distinction without a difference? The constitutional injury is no less severe to those who are deprived of their right to an impartial tribunal regardless of whether the contributions are direct or indirect. Why not hear both cases now and put a stop to the constitutional injuries that are occurring throughout the country, and not as Respondents suggest, decide the issue on a piecemeal basis?

CONCLUSION

The disdain which Respondents have shown for Dupre's right to an impartial tribunal can best be encapsulated by the following passage in their brief: "Dupre received all the process to which he was due." R. at 1. Dupre asks this Court to examine whether Respondents' statement rings true.

Respectfully submitted,

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